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ABSTRACT

The U.S. Supreme Court decision in "Hazelwood School District v. Kuhlmeier" established that a public high school newspaper, produced by students in a journalism class, is not a forum for public expression. The Court said that although school board policy specified that student free speech would not be restricted, other factors concerning the newspaper's publication made oversight by the principal allowable. This decision established educators' right to exercise editorial control over school-sponsored publications as long as the actions served legitimate teaching concerns. In "Tinker v. Des Moines Independent School District," the Court established that schools may punish student expression only when it substantially disrupts school activities. Two cases, "Rivera v. East Otero School District" and "Hemery v. School Board of Colorado Springs," defined how schools may regulate the distribution of religious materials. The Eugene, Oregon, school district used the "Tinker" precedent to support its decision to keep out of school a student who was a gang member. In the area of hate speech, "Bethel School District 403 v. Fraser" established that students' free speech rights must be balanced against teaching students socially appropriate behavior. (JPT)

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STUDENT EXPRESSION: THE FIRST AMENDMENT DOES NOT PROTECT EVERYTHING

(Student Newspapers, Handouts, Protests, Gangs, and Hate Speech)

Presentation to Oregon School Law Conference

Joe B. Richards
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TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

A. SCHOOL-SPONSORED PUBLICATIONS

A public high school newspaper, written and edited by students in a journalism class, is not a forum for public expression. Accordingly, school officials are entitled to regulate the contents where certain tests are met. Hazelwood School District v. Kuhlmeier, 484 US 260, 108 S Ct 562 (1988).

A careful study of those conditions is essential. They were:

1. The school board policy provided the school-sponsored student publications will not restrict free expression, but also stated the publications are to be developed within the adopted curriculum.

2. The school's curriculum guide described the journalism class as a laboratory situation in which the students publish the school newspaper, to apply learned skills.

3. The journalism class was taught by a faculty member during regular class hours.

4. The teacher is the final authority with respect to almost every aspect of the production and publication of the newspaper, including its content.

5. Each issue must be reviewed by the principal prior to publication.

Hazelwood, *supra*, held that a high school principal acted reasonably and didn't violate students' First Amendment rights when he required deletion from a school-sponsored student newspaper of an article written by the student. The topic was pregnancy experiences of three students. The principal was entitled to conclude that the article did not adequately protect the anonymity of the pregnant students, that it was not sufficiently sensitive to the privacy interests of the pregnant students' boyfriends and parents, and that student comments concerning their own sexual histories was inappropriate in a paper distributed to 14-year-old students. Nor did the principal violate the First Amendment rights in deleting an article concerning the impact of divorce on students at the school. The article identified by name another student and criticized her father as an inattentive parent. The principal concluded the father

should have been given an opportunity to defend himself from the standpoint of fairness and would not now allow printing without deletion of the name.

Nor was it an error for him to take out whole pages which contained the articles where there was not time to make any changes in the articles and the newspaper had to be printed immediately or not at all.

What can we learn from Hazelwood? Educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored newspapers as long as the actions are reasonably related to legitimate teaching concerns. It is only when the decision to censor a school-sponsored publication, theatrical publication, or other means of student expression has no valid educational purpose. Then the First Amendment is so directly and sharply implicated that it violates student rights. A school may, in its capacity as publisher of the school newspaper or producer of a school play, disassociate itself not only from the speech that would substantially interfere with its work or impinge upon the rights of students, but also speech that is undramatical, poorly written, inadequately researched, vulgar or profane or unsuitable for immature audiences.

There is no requirement that school officials' pre-publication control over school-sponsored publications be exercised only where there are specific regulations. School facilities may be deemed to be public forums, for the purpose of the first amendment freedom of speech, only if the school authorities have, by policy or by practice, opened these facilities for indiscriminate use by the general public, or some segment of the public, such as student organizations. However, if the facilities have instead been reserved for other purposes, then no public forum has been created, and the school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community.

B. NON-SCHOOL PUBLICATIONS

What about the off-campus publications by students? The control the schools are entitled to exercise over the school-sponsored publication is greater than that which educators may exercise over students' personal expression that happens to occur on the school premises. Tinker v. DesMoines Independent School District, 393 US

503, 89 S Ct 733 (1969). We all know about that case. It was the black armband case protesting the Vietnam war. That landmark decision held that a school may punish student expression only when there is a "substantial disruption or material interference with" school activities. Any school regulation governing the off-campus publication that fails to meet First and Fourteenth Amendment standards, and take this test into account, will be held void for being too vague and too over broad. Nitzberg v. Park, 425 F2d 378.

C. HANDOUTS: STUDENT DISTRIBUTION OF RELIGIOUS MATERIALS

May students handout religious materials in the schools on the ground that this is protected "speech" guaranteed by the Constitution? Most school districts have not opened their facilities to the public, except with well defined restrictions. If a district's restrictions are neutral in their content (in that they are not aimed only at the regulation of religion) those restrictions may also limit the time, place and manner in which expressions are made on the school grounds.

One case invalidated the district's policy which prohibited the distribution of "material that proselytizes a particular religion or political belief." Rivera v. East Otero School District, 721 F Supp 1189 (D.Colo. 1989). Students had distributed a publication by Christian Advocates Serving Evangelism promoting the Christian religion. That court rejected the limited open forum analysis, because it was a pure speech issue. It also rejected the district's claim that distribution of religious material on school grounds would violate the Establishment Clause because this was not action "taken" by the government. Basically, the court held this restriction of material was invalid because the definitions were too broad.

On the other hand, if the school district limits its restrictions to religious materials as to the time, place and manner of distribution, those restrictions would likely be upheld. For example, in Hemery v. School Board of Colorado Springs, 760 F Supp 856 (1991), the refusal was specific: students were not allowed to distribute this same religious tract in hallways because it would disrupt normal school activities. Enforcing a policy that prohibited obstruction of hallways was deemed reasonable. This district carefully avoided any content-based prohibition.

Finally, courts should differentiate between the truly interpersonal student communication protected by the Tinker case and

distribution by students of materials promoted by outside groups. Even so, any prior approval requirement that will give schools unlimited discretion to suppress protected speech in advance will not be upheld. (***Practice tip:*** It would be reasonable to restrict distribution to exit doors immediately before school or at tables near the cafeteria during a lunch hour. Also, a complete prohibition against distribution to impressionable elementary school students would likely be upheld.)

D. STUDENT PROTEST

What happens when the student's parent is a striking teacher and the student wears a button with the slogan "I'm not listening, scab!" or "Do scabs bleed?" Then may the student be disciplined because such buttons are "disruptive"? The answer was "no" in Chandler v. McMinnville School District, ____ F2d ____, (Slip Op, 9th Cir, October 28, 1992). The court noted that school officials did not try to suppress the buttons containing the words "Students United for Fair Settlement" or "We want our real teachers back." Therefore, the court said the district failed to show that the word "scab" could be considered in an of itself "vulgar, lewd, obscene or plainly offensive within the meaning of Bethel School District v. Fraser, 478 US 675, 682 (1986)." Nor did those buttons "bear the imprimatur of the school," so it was not school-sponsored speech as in Hazelwood, discussed earlier in this paper. Nor could the school officials reasonably forecast that these buttons would substantially disrupt, or materially interfere with, school activity. The District Court had held that the "scab" buttons were inherently disruptive, but the Ninth Circuit Court found that nothing substantiated that conclusion. Keep in mind here that this case came on for hearing because the lower court had dismissed a complaint. At trial, the district might have been able to offer evidence that the buttons, in fact, caused a disruption. This case only stands for the fact that the mere use of the word "scab" does not establish as a matter of law that the buttons could be suppressed absent a showing of potential disruption. Further, on remand, the Ninth Circuit stated the District Court should consider the student's claim for violation of his First Amendment rights to freedom of assembly and association. Justice Goodwin, in his concurring opinion, said the analysis should only consider Tinker: Students cannot be punished for merely expressing their views on campus unless school authorities could reasonably forecast that such expression will cause "substantial disruption of or material interference with school activities."

E. GANGS

The Eugene School District on December 6, 1989, obtained a permanent injunction against Robbie Robinson, prohibiting him from attending Eugene schools, so long as the School District could demonstrate that Robinson was a member or affiliate of the "Bloods" gang, and based on such membership and his past known activities, his presence in the District schools constituted a danger to others while in the public school setting or would be so disruptive to the school that he attends that he should be excluded from school. The order specifically enjoined the enforcement of ORS 339.115(1) which requires that the school district board shall admit free of charge to schools of the district all persons between the ages of six and 21, residing in the district. A copy of the complaint is attached as Exhibit "A". The District mainly relied on Tinker v. DesMoines Independent School District, 339 US 503, previously cited in this paper, which holds that a school district does have the right to exclude students whose behavior substantially interferes with the work of the school or impinges upon the rights of other students, even if the conduct is only reasonably anticipated.

In this case the Eugene School District had a rule:

> ***"Any conduct that substantially disrupts school activity, or is likely to, is forbidden."***

More recently, a U. S. District Court in Illinois granted a temporary injunction against a student wearing an earring which the district maintained was a gang symbol. Olesen v. Board of Education, 676 F Supp 820 (1987). The district had a very specific policy regarding gangs.[1]

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[1] **This Board of Education feels that the presence of gangs and gang activities can cause a substantial disruption of or material interferences with school and school activities. A "gang" as defined in this policy is any group of two or more persons whose purposes include the commission of illegal acts. By this policy the Board of Education acts to prohibit the existence of gangs and gang activities as follows:**

No student on or about school or at any school activity:

1. Shall wear, possess, use, distribute, display or sell any clothing, jewelry, emblem, badge, symbol, sign or other things that are evidence of membership of affiliation in any gang.

The board policy did not specifically ban wearing of earrings, but the administration concluded that male students at the school were wearing earrings to demonstrate their gang affiliation.

The judge held that students were expected to learn the rules which governed their behavior not only in school, but also in society. They are taught that they have individual rights and that those rights must be balanced with the rights of others. The court further held that the direction and manner of this instruction rests with the board, not the federal court, citing Bethel Dist. v. Fraser, 106 S Ct 3159 (1986), cited earlier in this paper. The court disagreed that Olesen was trying to exercise his right of free speech. That would have required him to convey a particularized message. His only message was one of "individuality." Such a "message" is not within the protected scope of the First Amendment. Nor was the court persuaded that this was a violation of equal protection, since the school forbid earrings on boys but not girls. The court agreed with the school's recognition that the wearing of earrings by males generally connoted gang membership.

As noted in the Robinson complaint, attached, there was a separate allegation that Robinson had been picked up as a known occupant of a car involved in a drive-by shooting that had occurred in Portland the same year. There is some doubt that in Oregon courts will uphold a broad rule against gang membership, unless it can be shown that the specific activity of the specific student will likely lead to substantial disruption.

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2. **Shall commit any act or omission, or use any speech, either verbal or nonverbal (gestures, handshakes, etc.) showing membership or affiliation in any gang.**
3. **Shall use any speech or commit any act or omission in furtherance of the interest of any gang or gang activity including, but not limited to**
   a. soliciting others for membership in any gangs
   b. requesting any person to pay protection or otherwise intimidating or threatening any person
   c. committing any other illegal act or other violation of school district policies
   d. inciting other students to act with physical violence upon any other person.

F. HATE SPEECH

Use of profane or obscene language is sufficient cause for discipline, suspension, or expulsion from school. ORS 339.250(4).

Many school districts, in their freedom of student expression policy, add the following:

> ***"The use of obscene language or threats of harm to persons or property are prohibited."***

Oregon's Constitution, Article I, Section 8, provides:

> ***"No law shall be passed restricting the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."***

The United States Supreme Court has spoken on the topic of student use of offensive language. Bethel School District v. Fraser, 478 US 675, 106 S Ct 3159 (1986) said the freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against society's interest in teaching students the boundaries of socially appropriate behavior. The First Amendment did not prevent this school district from suspending a high school student for two days in response to a speech he delivered before a school assembly. It referred to a candidate for student office in terms of an elaborate, graphic and explicit sexual metaphor. The district was held to have acted within its authority because (1) the penalties imposed were unrelated to any political viewpoint, and (2) the First Amendment does not prevent the school officials from determining that to permit such a vulgar and lewd speech would undermine the school's basic educational mission.

The First Amendment guarantees that grant wide freedom to adult speech do not necessarily apply to children in the public school. The Constitution does not prohibit the states from insisting that certain modes of expression are inappropriate and subject to sanctions. For example, it is an appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse, since the fundamental values necessary to the maintenance of a democratic political system disfavor the use of terms of debate highly offensive or highly threatening to others. The inculcation of these values is the work of the schools. The determination of what manner

of speech in the classroom or school assembly is inappropriate properly rests with the school board.

Even earlier cases had held that verbal communication from a student to a teacher which included fighting words, lewd and obscene language, or profane and libelous language are not safeguarded by the Constitution. Fenton v. Stear, 423 F Supp 767 (DC Pa.)

The question remains whether or not "hate speech" directed at minorities or anyone else could be viewed as "obscene." By ordinary definition, that term includes the terms "disgusting" or "repulsive." The best grounds to attack hate speech, and to stamp it out at an early stage, is the justifiable claim that such speech will cause "substantial disruption of or material interference with school activities" and thereby meet the Tinker test. Possibly the Ninth Circuit in Chandler v. McMinville School District, *supra*, (1992), added a new category when it was questioning whether the "scab" buttons should be considered "per se vulgar, lewd, obscene, or plainly offensive * * *" (emphasis supplied). Hate speech is plainly offensive by anyone's definition.

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12/10/92